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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 PETER ROSS,

12 Plaintiff,

13 v.

14 P.J. PIZZA SAN DIEGO, LLC., et al,

15 Defendants.
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Case No.: 3:16-cv-02330-L-JMA

**ORDER DENYING DEFENDANT'S
MOTION [Doc. 10] TO DISMISS**

17 Pending before the Court is Defendant PJ Cleveland LLC's ("Defendant") motion
18 to dismiss¹ Plaintiff's first amended complaint as to it. The Court decides the matter on
19 the papers submitted and without oral argument. See Civ. L. R. 7.1(d.1). For the reasons
20 stated below, the Court **DENIES** Defendant's Motion.

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27 ¹ Defendant also moves to compel arbitration pursuant to the Arbitration Agreement Plaintiff executed
28 with co-defendants P.J. Pizza San Diego LLC and P.J. Pizza Holdings. In light of this Court's previous
order finding the Arbitration Agreement invalid (See May 11, 2017 Order [Doc. 40]) the Court **DENIES**
Defendant's present motion to enforce it.

1 **I. BACKGROUND**

2 The three defendants in this action collectively own and operate approximately
3 twenty five Papa John's Pizza franchise stores in the San Diego area. Plaintiff was a
4 delivery driver for defendants. Like other delivery drivers employed by defendants,
5 Plaintiff used his own vehicle to make deliveries and defendants provided financial
6 reimbursement. Because defendants' reimbursement formula underestimates the drivers'
7 automobile expenses, Plaintiff's effective hourly wage fell below that required by federal
8 and California law. Accordingly, On November 11, 2016, Plaintiff filed an Amended
9 Complaint against defendants alleging various putative class and collective action claims
10 stemming from violations of California and federal labor laws. (See FAC [Doc. 3].)
11 Defendant PJ Cleveland now moves to dismiss the First Amended Complaint as to it,
12 arguing Plaintiff has not adequately alleged it was a joint employer. (See MTD [Doc.
13 10].) Plaintiff opposes. (See Opp'n [Doc. 17].)
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15 **II. LEGAL STANDARD**

16 The court must dismiss a cause of action for failure to state a claim upon which
17 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
18 tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n.*, 720 F.2d 578,
19 581 (9th Cir. 1983). The court must assume the truth of all factual allegations and
20 "construe them in the light most favorable to [the nonmoving party]." *Gompper v. VISX,*
21 *Inc.*, 298 F.3d 893, 895 (9th Cir. 2002); *see also Walleri v. Fed. Home Loan Bank of*
22 *Seattle*, 83 F.2d 1575, 1580 (9th Cir. 1996).

23 As the Supreme Court explained, "[w]hile a complaint attacked by a Rule 12(b)(6)
24 motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to
25 provide the 'grounds' of his 'entitlement to relief' requires more than labels and
26 conclusions, and a formulaic recitation of the elements of a cause of action will not do."
27 *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007) (internal citations and
28 quotation marks omitted). Instead, the allegation in the complaint "must be enough to

1 raise a right to relief above the speculative level.” *Id.* at 1965. A complaint may be
2 dismissed as a matter of law either for lack of a cognizable legal theory or for insufficient
3 facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530,
4 534 (9th Cir. 1984).

5 6 **III. DISCUSSION**

7 Defendant argues the Court should dismiss it from this action because the FAC
8 does not adequately allege Defendant was a joint employer of Plaintiff.² Joint
9 employment generally exists when “1) the employers are not “completely disassociated”
10 with respect to the employment of the individuals and 2) where one employer is
11 controlled by another or the employers are under common control.” *Chao v. A-One Med.*
12 *Servs. Inc.*, 346 F.3d 908, 918 (9th Cir. 2003) (*citing* 29 C.F.R. § 791(b)(3).)

13 Here, Plaintiff alleges that an individual named Christopher Kelleher manages all
14 three defendants to this action and that all three defendants have integrated their
15 operations such that they share in the right to make hiring and firing decisions and to
16 direct all employees’ work efforts and compensation. (FAC ¶¶ 10, 25.) For purposes of
17 this Fed. R. Civ. P. 12(b)(6) motion, these allegations, taken as true, plausibly suggest
18 that Defendant may have been a joint employer of Plaintiff. *See Creech v. P.J. Wichita,*
19 *L.L.C.*, 2016 WL 4702376 (D. Kan. 2016) (reaching the same conclusion on a nearly
20 identical complaint drafted by the same attorneys). Accordingly, the Court **DENIES**
21 Defendant’s motion to dismiss.

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28 ² The Court notes that Defendant has withdrawn its motion to the extent it argued Plaintiff failed to properly allege the elements of Federal Rule of Civil Procedure 23. (Reply [Doc. 27] 4:1–6.)

1 **IV. CONCLUSION & ORDER**

2 For the foregoing reasons the Court **DENIES** Defendant's motion to dismiss.

3 **IT IS SO ORDERED.**

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5 Dated: May 15, 2017

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7 Hon. M. James Lorenz
8 United States District Judge
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